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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 85

CITIES SERVICE GAS COMPANY, a Corporation,
Appellant,
VERSUS
STATE CORPORATION COMMISSION OF KANSAS, MARIAN BEATTY, Chairman, RICHARD C. BYRD and HARRY G. WILES, as Members of Said Commission, and their Respective Successors in Office,
Appellees.

ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR THE APPELLANT

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October, 1957.

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BRIEF FOR THE APPELLANT

OPINION BELOW

The Opinion of the Supreme Court of the State of Kansas (R. 90), whose judgment is under review in this appeal, is reported in 180 Kan. 454, 304 P.2d 528, with the Memorandum Opinion of the State Corporation Commission of Kansas attached thereto as Appendix (R. 45).

JURISDICTION

The judgment of the Supreme Court of the State of Kansas was entered December 8, 1956 (R. 90-102). On January 4, 1957, appellant's motion for rehearing (R. 103-109) was denied without opinion, and such judgment thereupon became final (R. 109). Within the time prescribed by 28 U.S.C.A. 2101(c), 63 Stat. 961, appellant duly filed and served its notice of appeal to this Court (R. 110-112). The jurisdiction of this Court to review such final judgment by direct appeal is authorized by 28 U.S.C.A. 1257(2), 62 Stat. 929, and supported by the recent decisions of this Court in *Natural Gas Pipeline Company of America* v. *Panoma Corporation, et al.*, *Natural Gas Pipeline Company of America* v. *Corporation Commission of the State of Oklahoma, et al.*, 349 U.S. 44, 99 L. Ed. 866; *Cities Service Gas Company* v. *Peerless Oil and Gas Company, et al.*, 340 U.S. 179, 95 L. Ed. 190, and *Phillips Petroleum Company* v. *State of Oklahoma, et al.*, 340 U.S. 190, 95 L. Ed. 204. See Rules 10 and 11 of this Court. On May 27, 1957, this Court entered its order noting probable jurisdiction in the case. 353 U.S. 971.

QUESTION PRESENTED

Can a state, in the exercise of its gas conservation powers, lawfully fix a minimum price for natural gas sold in interstate commerce for resale, in the face of the provisions of the Natural Gas Act, giving the Federal Power Commission exclusive jurisdiction over the rates at which natural gas is sold in interstate commerce for resale?

STATUTES INVOLVED

Natural Gas Act, 15 U.S.C.A. 717, 52 Stat. 821, 822, Sections 1(b), 2(6), and 4(a), reading:

> § 1(b) "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."
>
> § 2(6) "Natural-gas company means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."
>
> § 4(a) "All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful."

Order of the Corporation Commission of the State of Kansas, having the force and effect of a state statute,[1] entered December 2, 1953, effective January 1, 1954, fixing a minimum price for natural gas produced and sold in the

---

[1] *Stratton* v. *Atchison, T. & S. F. Ry. Co.*, 118 Kan. 673, 236 Pac. 831; *White Eagle Oil Company* v. *State Corporation Commission*, 168 Kan. 548, 549, 214 P.2d 337.

Kansas-Hugoton Field, the material portion of which orde reads:

> "That all persons, firms or corporations which tak gas or cause gas to be taken from the Hugoton Ga Field in Kansas on or after January 1, 1954, 12:01 A.M. shall, as a condition precedent for withdrawal from th common source of supply, pay or attribute to all ga taken, except gas for the operations of leases, for al purposes including payments to producers, landowners leaseowners and royalty owners, the fair and reason able minimum price of not less than eleven cents (11¢ per Mcf. (14.65# p.s.i.a.) at the wellhead until furthe order or orders of this Commission" (R. 4, 39-45).

G.S. Kan., 1949, 55-701 to 55-713 (both inclusive) upon which said minimum gas price-fixing order is based and G. S. Kan., 1949, 55-606, governing the procedure for review of said price order, are somewhat lengthy and, there fore, together with said price order, are set forth in full i Appendices A, B, and C, respectively, hereto.

STATEMENT

Appellant, Cities Service Gas Company, is a natura gas company as defined in the Natural Gas Act as amende (15 U.S.C.A. 717, 52 Stat. 821). It is engaged generally i the business of producing and purchasing natural gas fo transportation and sale in interstate commerce for resal under the provisions of said Act by means of an integrate pipeline system extending from Texas into and throug Oklahoma and Kansas and into Missouri and Nebraska (R 5, 68-69, 79).

In operating its interstate integrated pipeline system and as an integral part thereof, appellant has, among other things, entered into subsisting arms-length, privately negotiated, long-term contracts with large and responsible producers in the Kansas-Hugoton Field for the purchase of natural gas delivered to it therein at prices substantially lower than the minimum price fixed by the Commission's price order (R. 5-10, 68-69, 80, 81, 204, 215). Part of the gas purchased in the Kansas-Hugoton Field is delivered by the producers therein to appellant at the wellhead, while the other part of the gas purchased is delivered to appellant's pipeline in the field after production and gathering thereof by the producer have ended (R. 6-7, 81). Appellant owns no production in the Kansas-Hugoton Gas Field, but purchases therein all the gas it takes therefrom (R. 7). Of the gas purchased by appellant in said Field during the year 1951, 55.4 per cent thereof was delivered at the wellhead and 44.6 per cent was delivered by producers to appellant after the producers had completed the production and gathering thereof (R. 6-7, 81). Of the total gas purchased by appellant in said Field during 1951, 73.74 per cent was treated (processed) by the producer for the extraction of hydrocarbons and 26.53 per cent was not so treated *(id.)*.

Appellant's principal markets are in Kansas, Missouri and Oklahoma (R. 5). Natural gas to operate its pipeline systems and to supply it markets is obtained from four major sources of supply (R. 5, 19). Most of its supply of gas for the markets it serves comes from the Oklahoma and Kansas portions of the Hugoton Field (R. 5). Approximately 31 per cent of appellant's total gas supply is produced in the Kansas-Hugoton Field (R. 19). Gas from

this Field is transported by appellant eastward through its 26-inch interstate pipeline extending from said Field to a point in Missouri near Kansas City, and southward from said Field through its 16-inch and 12-inch pipeline across the Kansas State line into Oklahoma where the gas enters its 20-inch line extending from the Oklahoma Gas Field eastward to Blackwell, Oklahoma, thence across the state line to points in Kansas and Missouri (R. 79, Ex. 34).

In the operation of appellant's pipeline system it is necessary to diffuse and commingle the gas from all its sources of supply in order to take care of its markets, not one particular market. No particular source of supply is dedicated to serve any particular area on appellant's pipeline system (R. 15-19). Because of the commingling of gas from the various sources of supply of appellant through the numerous connections of its pipelines (see map, Ex. 34, R. 79, 15-19) it would be almost impossible at the market ends of the pipelines, to identify gas in the commingled stream as coming from any particular source. It was, however, estimated by a witness and not contradicted that 48.5 per cent of the gas purchased by appellant in the Kansas-Hugoton Field in 1952 was consumed in Kansas. Thus over 50 per cent of the Kansas-Hugoton gas purchased by appellant was transported and sold for resale outside of the State of Kansas (R. 18-19).

Since appellant is a natural gas company as defined in the Natural Gas Act, all of its sales for resale are made under rates established and approved by the Federal Power Commission (R. 5, 68, 79, Ex. 34). See *Cities Service Gas Company* v. *Federal Power Commission*, 155 F.2d 694. As

a matter of fact, appellant's 26-inch pipeline extending from the Kansas-Hugoton Gas Field to Kansas City, Missouri was certificated as an interstate transmission facility by the Federal Power Commission, as were, also, the other portions of appellant's integrated pipeline system. See *Re: Cities Service Gas Company*, Docket G-729, 6 F.P.C. 701, *et seq.*, and Docket C-298, 4 F.P.C. 471-472.

Notwithstanding the foregoing uncontradicted facts, the Corporation Commission of the State of Kansas, after hearing, and on December 2, 1953, effective January 1, 1954, issued its said minimum gas price-fixing order for the Kansas-Hugoton Field (R. 39-45). This order required all persons who "'take gas or cause gas to be taken" from said Field as a condition precedent for withdrawal from the common source of supply to *"pay or attribute to all gas taken, except gas for the operation of leases, for all purposes including payment to producers, landowners, leaseowners and royalty owners, the fair and reasonable price of not less than eleven cents (11¢) per Mcf. at the wellhead"* (Emphasis supplied).

Based on the estimated volumes of gas to be purchased in 1953, the impact of the order was to increase appellant's purchase gas costs by approximately $4,000,000.00 annually (R. 13-14, Ex. 46, R. 86-87).

Within the time prescribed by statute and on December 11, 1953, appellant duly filed with said Corporation Commission its petition for a rehearing of said gas price-fixing order (R. 51). In such petition for a rehearing appellant asserted it was a natural gas company as defined by the Natural Gas Act and that said Commission had no

jurisdiction or authority to issue said price order as applied to the operations of appellant, as evidenced by the record (R. 62). On December 16, 1953, said Corporation Commission entered its order denying appellant's petition for a rehearing (R. 67).

On January 14, 1954, within the time prescribed by the Kansas statutes, appellant, as plaintiff, instituted an action against said Commission, as defendant, in the District Court of Finney County, Kansas, attacking said minimum gas price-fixing order (R. 68). In its petition appellant, among other things, alleged it was a natural gas company as defined in the Natural Gas Act and that said Commission had no jurisdiction or authority to issue said minimum gas price-fixing order as applied to the operations of appellant, as evidenced by the record (R. 68, 71). The case was heard by the District Court of Finney County, Kansas, on April 26, 1956. On May 14, 1956, that Court entered its judgment upholding, sustaining and affirming said gas price-fixing order as applied to the operations of appellant (R. 75-76). On May 19, 1956, appellant duly filed and served its notice of appeal to the Kansas Supreme Court for a review of specific federal questions (R. 78), namely:

> "1. The Corporation Commission was without jurisdiction or authority to promulgate and issue its said minimum gas price-fixing order as applied to sales of natural gas made by producers to appellant in the Kansas-Hugoton Field, *after its production and gathering had ended*, for transportation and resale in interstate commerce, for the reason that such sales are subject to the exclusive jurisdiction of the Federal Power Commission under the Natural Gas Act (15 U.S.C.A. 717).

"2. The Corporation Commission was without jurisdiction or authority to promulgate and issue its said minimum gas price-fixing order as applied to sales of natural gas *at the wellhead* in said Kansas-Hugoton Field, by producers to appellant, for transportation and resale in interstate commerce, for the reason that such sales are subject to the exclusive jurisdiction of the Federal Power Commission under the Natural Gas Act (15 U.S.C.A. 717)" (Emphasis supplied) (R. 1-2).

The Supreme Court of Kansas affirmed the judgment of the trial court upholding and sustaining said minimum gas price-fixing order of said Corporation Commission as applied to appellant and its operations, 180 Kan. 454, 304 P.2d 528. Appellant's motion for a rehearing was denied without opinion (R. 109). The case is now before this Court based on the single federal question set forth on page 2 hereof.

SUMMARY OF ARGUMENT

No contention is here made, or was made, in the Supreme Court of Kansas that in the absence of the provisions of the Natural Gas Act a state may not regulate sales of natural gas in interstate commerce for resale, as a conservation measure. Appellant believes that this Court's decisions in *Cities Service Gas Company* v. *Peerless Oil and Gas Company, et al.*, 340 U.S. 179, 95 L. Ed. 190, and *Phillips Petroleum Company* v. *State of Oklahoma*, 340 U.S. 190, 95 L. Ed. 204, settled the question of the authority of a state, as a conservation measure, to regulate such sales of gas in interstate commerce, in the absence of

the contention that such sales are under the exclusive jurisdiction of the Federal Power Commission by reason of the provisions of the Natural Gas Act. The position of appellant herein is simply that Congress by the provisions of the Natural Gas Act, 15 U.S.C.A. 717, 52 Stat. 821, Sec. 1(b), *et seq.*, has entered and fully occupied the field of regulating

> "* * * the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such * * * sale * * *."

and that the exclusive jurisdiction to regulate such a sale, whether made in the field at the end of gathering or at the wellhead, rests solely in the Federal Power Commission under the Act. No state, therefore, has any authority, right or jurisdiction to regulate such sales. *Natural Gas Pipeline Company of America* v. *Corporation Commission of the State of Oklahoma, et al.*, 349 U.S. 44, 99 L. Ed. 866, and *Phillips Petroleum Company* v. *State of Wisconsin, et al.*, 347 U.S. 672, 98 L. Ed. 1035.

ARGUMENT

I.

Kansas Price Order is invalid as applied to sales of gas made by producers in the field to appellant after the production and gathering thereof have been completed.

This Court in *Natural Gas Pipeline Company of America* v. *Panoma Corporation, et al.*, 349 U.S. 44, 45, 99 L. Ed. 866, decided April 11, 1955, definitely determined that the State of Oklahoma through its Corporation Commission had

no authority by a minimum gas price-fixing order to regulate sales of natural gas in interestate commerce for resale after its production and gathering had ended. In clearly understandable language this Court said:

> "In these cases Oklahoma has attempted to fix a minimum price to be paid for natural gas, after its production and gathering has ended, by a company which transports the gas for resale in interstate commerce. We held in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 98 L. Ed. 1035, 74 S Ct 794, that such a sale and transportation cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission. The *Phillips* case, therefore controls this one.
>
> "We disagree with the contention of the appellees that *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 95 L. ed 190, 71 S Ct. 215, and *Phillips Petroleum Co.* v. *Oklahoma*, 340 US 190, 95 L ed 204, 71 S Ct 221, are applicable here. In those cases we were dealing with constitutional questions and not the construction of the Natural Gas Act. The latter question was specifically not passed upon in those cases. Reversed.
>
> "Mr. Justice Douglas, being of the opinion that State regulation of price is permissible until the Federal price regulation permitted by *Phillips Petroleum Co.* v. *Wisconsin*, 347 US 672, 98 L ed 1035, 74 S Ct 794, is imposed, dissents."

The uncontradicted record in this case discloses (R. 5-8), and the Supreme Court of Kansas in its opinion and decision, *Cities Service Gas Company* v. *State Corporation Commission*, 180 Kan. 454, 459, 304 P.2d 528, 532-533, found:

> "During all dates in question the Gas Company, a natural gas company as defined in the Natural Gas Act,

in its operations in the purchase of gas in the Kansas-Hugoton Field purchased gas from the producers delivered at the wellhead, also delivered at its pipe line in the field after production and gathering had ended. It had no production in the field and purchased therein all gas so obtained. Of the gas so purchased during the year 1951, 55.4 per cent was purchased at the wellhead and 44.6 per cent pipeline delivered in the field after production and gathering had been completed.

"From what has been heretofore stated it appears that the sales of gas made by producers in the field to the Gas Company, in the first instance after production had ceased and in the second after production and gathering had ended, were sales in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or other uses."

It is therefore perfectly apparent, not only from the record but by the decision of the Supreme Court of Kansas, that during all times in question in this case appellant was a natural gas company and a purchaser of natural gas in the Kansas-Hugoton Field for transportation and resale in interstate commerce. Of the gas purchased by appellant in the Field 44.6 per cent thereof was sold by the producer to appellant delivered in the field after production and gathering thereof had been completed, and 55.4 per cent thereof was sold by producer to appellant at the wellhead therein.

The portion of the Kansas price-fixing order material to a determination of this case requires:

"*That all persons, firms or corporations which take or cause gas to be taken* from the Hugoton Gas Field in Kansas on or after January 1, 1954, 12:01 A.M. *shall*, as a condition precedent for withdrawal from the com-

> mon source of supply, *pay* or attribute to all gas taken * * * *for all purposes including payments to producers, landowners, leaseowners and royalty owners the fair and reasonable minimum price of not less than eleven cents (11¢) per Mcf. * * * at the wellhead * * *"* (Emphasis supplied) (R. 4, 39-35).

In *Natural Gas Pipeline Company of America* v. *Panoma Corporation*, 349 U.S. 44, 99 L. Ed. 866, this Court had under consideration a Corporation Commission order which read:

> "That no natural gas shall be taken out of the producing structures or formations in the Guymon-Hugoton Field in Texas County, Oklahoma, at a price at the wellhead of less than 7¢ per Mcf. of natural gas measured at a pressure of 14.65# absolute pressure per square inch."—*Natural Gas Pipeline Company of America* v. *Panoma Corporation*, 271 P.2d 354, 363.

A comparison of the price order of the Oklahoma Commission with the price order of the Kansas Commission, under attack in this appeal, clearly discloses that such orders are essentially identical in form, substance and legal effect. When this Court said in *Natural Gas Pipeline Company* v. *Panoma Corporation, supra*, that sales of natural gas in interstate commerce for resale made "after its production and gathering has ended" cannot be regulated by a state minimum gas price-fixing order, but are subject to the exclusive regulation of the Federal Power Commission, and struck down the Oklahoma price order as invalid, it should be most apparent that an identical Kansas price order attempting to regulate the same type of sales of natural gas in interstate commerce for resale is also invalid.

From what has been said, it is eminently clear that this Court has recently and squarely decided that no state has either the jurisdiction or authority to regulate by minimum price order sales of natural gas in interstate commerce for resale made in the field after the production and gathering thereof have ended, because Congress by the provisions of the Natural Gas Act has entered and occupied to the exclusion of the states such field of regulation. Compare *J. M. Huber Corporation* v. *Federal Power Commission*, 236 F.2d 550 (C.A. 3, 1956), *certiorari denied*, January 14, 1957, 352 U.S. 971, 1 L. Ed.2d 324.

In view of the foregoing, appellant respectfully asserts that the price-fixing order of the Kansas Commission is an absolute nullity, invalid and unenforceable as applied to sales of gas made by producers in the Kansas-Hugoton Field to appellant after the production and gathering thereof have ended. *Natural Gas Pipeline Company of America* v. *Panoma, supra.*

II.

Kansas Price Order is invalid as applied to sales of gas made by producers in the field to appellant at the wellhead.

The fact that 55.4 per cent of the gas purchased by appellant from producers in the Kansas-Hugoton Gas Field is delivered at the wellhead (R. 6) in no way exempts or diminishes federal jurisdiction by the Federal Power Commission under the Natural Gas Act.

From the plain language of Sections 1(b), 2(6), and 4(a) of the Natural Gas Act, it is clear that it is the "sale" of natural gas in interstate commerce for resale that is regu-

lated by the Act. The point at which such sale is made, whether at the wellhead or in the field after gathering has ended, is immaterial. If it were otherwise, federal jurisdiction could be defeated merely by changing the point of delivery and sale of the gas. Jurisdiction under the Act would vary from state to state depending upon the point at which a state sought to exercise its price-fixing jurisdiction as a conservation measure. The factual situation here presented is illustrative of the lack of any rational basis for a distinction which would make 44.6 per cent of appellant's purchased gas subject to federal regulation because made at the end of gathering, and deny federal regulation as to 55.4 per cent thereof because made at the wellhead. Such an irrational basis for regulation by federal and state authority of gas produced and sold in the same field and transported to markets in the same pipeline is so self-evidently impractical that it defeats and make ineffective its own logic.

As pointed out by this Court in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 691, 98 L. Ed. 1035, 1047, the

> "* * * jurisdiction of the Federal Power Commission was not intended to vary from state to state, depending upon the degree of state regulation and of state opposition to federal control."

It is to be noted that in *Natural Gas Pipeline Company of America* v. *Panoma Corporation, supra*, 349 U.S. 44, 99 L. Ed. 866, this Court based its decision therein on *Phillips Petroleum Company* v. *State of Wisconsin, et al.*, 347 U.S. 672, 98 L. Ed. 1035. The Supreme Court of Kansas in its decision in this case completely overlooks the fact that in *Phillips* v. *Wisconsin, supra*, this Court interpreted and con-

strued the Natural Gas Act as giving the Federal Power Commission jurisdiction to regulate the rates at which independent producers sold gas for resale in interstate commerce. It has long been the rule of this Court that its interpretation and construction of an Act of Congress becomes an integral part of such statute and should be accepted and followed by all other courts. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Moser*, 275 U.S. 133, 136, 72 L. Ed. 200, 202. It is thus apparent, in view of the *Moser* case, *supra*, that this Court's interpretation of the Natural Gas Act has become an integral part of such Act. Under Article VI, Clause 2, of the United States Constitution, the Natural Gas Act as interpreted by this Court is the Supreme Law of the Land and the Judges in every state are bound thereby. *Case* v. *Bowles*, 327 U.S. 92, 102, 90 L. Ed. 552, 560; *Morris* v. *Jones*, 329 U.S. 545, 553, 91 L. Ed. 488, 497.

It is clear from a careful examination of the Kansas Supreme Court's judgment and decision in the case at bar that that Court sustained the validity of Commission's gas price-fixing order on the theory that it was an order relating to production and fell squarely within the excluding provisions of Sec. 1(b) of the Natural Gas Act. In the present case, the Kansas Supreme Court said (461-462):

> "So construed, recognizing as we must that under our own decisions (citing same) as well as those of the highest court of the land (citing same) the Commission has power to regulate the physical production and gathering of natural gas in the interest of conservation, including the protection of correlative rights and the prevention of waste, the involved order falls squarely within the hereinafter emphasized excluding provisions

of the Natural Gas Act (15 U.S.C.A. 717[b]), which reads:

> 'The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply* to any other transportation or sale of natural gas or to the local distribtuion of natural gas or to the facilities used for such distribution or *to the production or gathering of natural gas.* (Emphasis supplied.)'

"Thus, based on our construction of the order and since the Federal Act, as heretofore quoted, expressly provides that its terms shall not apply to the production of natural gas, it appears the trial court did not err in concluding the Commission's order should be upheld and sustained."

In *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, 677, 98 L. Ed. 1035, 1045, this Court said:

"They (petitioners) contend, however, that the affirmative grant of jurisdiction over such sales (sales in interstate commerce for resale) in the first clause of § 1(b) (Natural Gas Act) is limited by the negative second clause of the section. In particular, the contention is made that the sales by Phillips are a part of the 'production or gathering of natural gas' to which the Commission's jurisdiction expressly does not extend.

"We do not agree. In our view, the statutory language, the pertinent legislative history and the past decisions of this Court all support the conclusion of the Court of Appeals that Phillips is a 'natural gas company' within the meaning of that term as defined in the

Natural Gas Act, and that its sales in interstate commerce of natural gas for resale are subject to the jurisdiction of and regulation by the Federal Power Commission."

On pages 681 and 682, this Court said further:

"The cases discussed above supply a ready answer to the determination of the Commission and also to petitioner's suggestion that 'production or gathering' should be construed to mean the 'business' of production and gathering, with the sale of the product considered as an integral part of such 'business.' We see no reason to depart from our previous decisions, especially since they are consistent with the language and legislative history of the Natural Gas Act.

"Rather, we believe that the legislative history indicates a congressional intent to give the *Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during or after transmission by an interstate pipeline company*" (Emphasis supplied).

It, therefore, is apparent that this Court in interpreting the provisions of the Natural Gas Act in the *Phillips* case has squarely determined that the Federal Power Commission under the Act has exclusive jurisdiction to regulate sales of natural gas in interstate commerce for resale, regardless of where the sale in the field occurs, and that the exemption provisions of Sec. 1(b) of the Act covering production or gathering of natural gas do not give the state authority or jurisdiction to regulate the sale of such gas on the ground that it is a part of production or gathering.

The recent case of *Deep South Oil Company of Texas* v. *Federal Power Commission*, — F.2d — (C.A. 5), No.

15849 (not yet officially reported), decided June 29, 1957, interprets the Natural Gas Act (following this Court's decision in *Phillips* v. *Wisconsin, supra)*, as giving the Federal Power Commission exclusive jurisdiction over wellhead sales, or "sales of natural gas made before the completion of production and gathering." The Court of Appeals specifically held that none of the wellhead sales for resale in interstate commerce is exempt from regulation under the Act for the reason that the exemptive language of Sec. 1(b) does not nullify the clear and specific grant of jurisdiction over "sales of natural gas in interstate commerce for resale." The Court said on page 10 of the slip opinion:

> "The fact that the sales are made at the wellhead is immaterial for the particular point at which the title and custody of the gas passed to the purchaser, without arresting its movement to the ultimate interstate destination, does not affect the essential interstate nature of the business. *Illinois Gas Company* v. *Public Service Company*, 314 U.S. 498, 503, 504."

To the same effect is the case of *Continental Oil Company* v. *Federal Power Commission*, — F.2d — (C.A. 5), decided June 29, 1957 (not yet officially reported).

Appellant, therefore, respectfully asserts that sales of natural gas in interstate commerce for resale made at the wellhead, as well as those made in such commerce at the end of gathering, are under the exclusive jurisdiction of the Federal Power Commission under the Natural Gas Act. Accordingly, no state has authority or jurisdiction to regulate the same.

CONCLUSION

The Supreme Court of Kansas in this case has stated in its opinion (459) that the

> "* * * sole question presented on appellate review is, that in the light of the facts and circumstances of record, the Commission (Corporation Commission of Kansas) had no jurisdiction to issue the minimum value attribution and/or price order in question because the sole and exclusive jurisdiction to make such an order is vested in the Federal Power Commission under the Natural Gas Act (15 U.S.C.A. 717)."

This definitely discloses a single federal question. The Kansas Supreme Court on page 462 of its opinion recognized that by reason of Article VI of the United States Constitution it is controlled in its action involving a federal statute by the interpretation placed thereon by the decisions of this Court.

The Court sought, however, to bring the state ordered price within the production and gathering exemption of the Natural Gas Act and to avoid the force and effect of this Court's recent interpretations of the Natural Gas Act in *Phillips* v. *Wisconsin* and *Natural Gas Pipeline* v. *Panoma*, *supra*, by asserting that the gas price-fixing order here under attack:

> "* * * *fixed a minimum price to be paid for gas before cessation of production*" (Emphasis supplied).

We respectfully submit that this assertion by the Kansas Court is not only contrary to the plain language of the order itself (which needs no interpretation as it specifically required payment of the ordered price as a condition precedent to the taking or causing to be taken of gas

from the reservoir), but is also completely at variance with the crystal clear language of the jurisdictional provisions [1(b)] of the Natural Gas Act dealing with that Act's application.

> "* * * to the *sale* in interstate commerce of natural gas for resale * * * and to natural-gas companies engaged in such * * * *sale*, * * *" (Emphasis supplied).

and the recent plainly written adjudications of this Court interpreting such act. Moreover, even assuming *arguendo* that the producer is prohibited under severe penalties (G.S. 1949, 55-708, 709 and 710) from producing and selling the gas in the field to this appellant unless the producer receives the 11 cents per Mcf. price fixed by said order, it is clear that appellant's purchases of gas from producers in the field are directly and adversely affected and appellant financially aggrieved thereby. *American Power & Light Company* v. *Securities & Exchange Commission*, 325 U.S. 385, 388, 89 L. Ed. 1683; *Columbia Broadcasting System, Inc.* v. *United States of America, et al.*, 316 U.S. 407, 422, 423, 86 L. Ed. 1563.

The Kansas Court completely overlooks in its opinion in the case at bar that:

(a) the *sale* of natural gas in interstate commerce for resale is the controlling jurisdictional factor determinative of the federal question in this case, not the place in the field where the sale occurs;

(b) the Court itself found (532-533) that of the sales here involved 55.4 per cent were made at the wellhead after production had ended and 44.6 per cent were made after both production and gathering had ended. In its decision in *Columbia Fuel Corporation* v. *Panhandle Eastern Pipe Line Company*, 176 Kan. 433, 271 P.2d 773, the Court held the prior 8 cents order (dif-

fering in no material respect except as to price from the present 11 cent order) obligated the pipeline purchaser to pay the ordered wellhead price as to gas purchased at the wellhead and to pay the ordered wellhead price plus the reasonable cost of gathering, as to gas purchased after both production and gathering had been completed;

(c) two masters cannot either logically or effectively enter and occupy at the same time a field of regulation dealing with identical subject matter.

Based upon the authorities herein cited and the reasoning advanced in this brief, appellant respectfully asserts that this Court should reverse the final judgment of the Supreme Court of Kansas here under review, declare the gas price-fixing order involved invalid and void *ab initio*, and grant appellant's motion for a summary judgment of reversal.

Respectfully submitted,

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October, 1957.

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APPENDIX

APPENDIX "A"

GENERAL STATUTES OF KANSAS, 1949.

Article 7. PRODUCTION AND CONSERVATION OF NATURAL GAS

55-701. Waste of natural gas prohibited. That the production of natural gas in the state of Kansas in such manner and under such conditions and for such purposes as to constitute waste is hereby prohibited.

55-702. Definitions. That the term "waste" as herein used, in addition to its ordinary meaning, shall include economic waste, underground waste and surface waste. Economic waste as used in this act, shall mean the use of natural gas in any manner or process, except for efficient light, fuel, carbon black manufacturing and repressuring, or for chemical or other processes by which such gas is efficiently converted into a solid or liquid substance. The term "common source of supply" wherever used in this act, shall include that portion lying within this state of any gas reservoir lying partly within and partly without this state. The term "commission" as used herein shall mean the state corporation commission of the state of Kansas, its successors, or such other commission or board as may hereafter be vested with jurisdiction over the subject matter of this act.

55-703. Production regulations, rules and formulas. That whenever the available production of natural gas from any common source of supply is in excess of the market demands for such gas from such common source of supply, or whenever the market demands for natural gas from any common source of supply can be fulfilled only by the production of natural gas therefrom under conditions constituting waste as herein defined, or whenever the commission finds and determines that the orderly development of, and production of natural gas from, any common source of

supply requires the exercise of its jurisdiction, then any person, firm or corporation having the right to produce natural gas therefrom, may produce only such portion of all the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying such developed lease and currently produce proportionately with other developed leases in said common source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof. The commission shall so regulate the taking of natural gas from any and all such common sources of supply within this state as to prevent the inequitable or unfair taking from such common source of supply by any person, firm or corporation and to prevent unreasonable discrimination in favor of or against any producer in any such common source of supply. In promulgating rules, regulations and formulas, to attain such results the commission shall give equitable consideration to acreage, pressure, open flow, porosity, permeability and thickness of pay, and such other factors, conditions and circumstances as may exist in the common source of supply under consideration at the time, as may be pertinent: *Provided, however,* That the daily takes of gas from any well shall not exceed 25 per cent of its open flow: *Provided further, however,* That the provisions of this act shall not apply to any common source of supply in which the average open flow of all the producing wells therein is not in excess of seven hundred fifty thousand cubic feet per day.

55-703a. Well spacing and orderly development. The drilling and completion of a gas well shall not of itself entitle said well to an allowable for production; and the commission may, in its discretion, provide for well spacing in any such common source of supply and provide for the orderly development thereof.

55-704. Rules and regulations authorized; notice and hearings. The commission shall promulgate such rules and regulations as may be necessary for the prevention of waste as defined by this act, the protection of all water, oil or gas-bearing strata encountered in any well drilled in such common source of supply, ascertaining the several factors entering into the determination of the productive capacity of each well, the total productive capacity of all wells in the common source of supply, the establishment of such other standard or standards as the commission may find proper to determine the productive capacity of each well and of all wells in such common source of supply, and as the commission may find necessary and proper to carry out the spirit and purpose of this act: *Provided, however,* That notice, as provided in section 8 (55-706) of this act, shall be served upon or given to the producers and purchasers of natural gas and all other persons, firms or corporations interested, of any hearing or hearings which may be called for the purpose of establishing any facts upon which any proposed rule or regulation may be based.

55-704a. Same; existing rules, regulations and orders; pending matters. All valid rules, regulations and orders of the commission, existing at the time this act takes effect and consistent with the provisions of this act, shall remain in force and effect unless revoked, changed or modified by the commission pursuant to the provisions of this act. All such rules, regulations and orders not consistent with the provisions hereof shall remain in force and effect, but only for such reasonable time as may be necessary for the commission to revoke, change, modify or make a substitute for the same in accordance with the provisions hereof. All future proceedings in matters validly pending before the commission at the time this act takes effect shall be in accordance with and pursuant to the provisions hereof.

55-705. Repealed, L. 1945, ch. 233, sec. 13.

55-705a. Certificate required; notice and hearing. Before any gas shall be produced from a well producing gas only, or from a well which is primarily a gas well, for any of the purposes specified in section 2 (55-702) of this act, a certificate shall be obtained from the commission for the construction of the facilities necessary or required and/or the utilization of the gas in the manner and for the purposes intended; and the commission shall issue such certificate unless it finds, upon application and after hearing, that the contemplated production or use of such gas is in violation of this act: *Provided, however,* That no such certificate shall be required on account of such facilities as were in existence or under construction, or such uses as were being made of such gas, on February 1, 1945.

55-705b. Application; notice. No allowable shall be granted by the commission for any gas well except upon application duly verified setting forth the location of the well and the description of the acreage attributable thereto, the common source of supply in which the same is located and such other information as the commission may require. Upon the filing of any such application the same shall be duly docketed and notice thereof given in the manner and for the time provided in section 8 (55-706) of this act.

55-706. Proceedings upon petition. Proceedings may be instituted before the commission upon petition of any interested party or by the attorney general on behalf of the state, or on the motion of the commission, upon any question relating to the enforcement of this act or the promulgation, revocation, amendment, renewal, interpretation, extension, or the enforcement of any rule, regulation or order, or the determination of any right thereunder, in the manner provided in section 55-605 of the General Statutes of Kansas of 1935, as amended, and that each and all of the provisions of said section as amended, shall apply to and govern such proceedings under this act.

55-707. Actions for judicial review; appeals. That actions for judicial review of any rule, regulation, order or decision of the commission under the provisions of this act may be brought and proceedings respecting same shall be governed by and appeals may be taken as provided in section 55-606 of the General Statutes of Kansas of 1935, as amended, and that each and all of the provisions of said section, as so amended, shall apply to and govern such actions arising under this act.

55-708. Penalties for violation. That in addition to any penalty that may be imposed by the state corporation commission, any person, firm or corporation, or any officer, agent or employee thereof, violating the provisions of this act, or valid order, rules or regulations of the commission shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine in any sum not exceeding $500, or by imprisonment in the county jail not exceeding six months, or by both fine and imprisonment.

55-709. Injunction and other remedies. That the state corporation commission shall have the right to maintain an action in any court of competent jurisdiction in this state to enforce by injunction, mandatory injunction, and any other appropriate or legal or equitable remedy any valid rule, order, or regulation made by the state corporation commission or promulgated under the provisions of this act, and said court shall have the authority to make and render such judgments, orders and decrees as may be proper to enforce any such rules, orders, and regulations made and promulgated by the state corporation commission.

55-710. Receivership upon violation of act. That in addition to any penalty imposed under the provisions of this act, and to the remedy and relief heretofore set forth, any person, firm or corporation violating the provisions of this act, valid order, rules or regulations of the commissions shall be subject to have his or its producing property

placed in the hands of a receiver by a court of competent jurisdiction, at the suit of the state of Kansas through the attorney general, but such receivership shall only extend to the operating of producing wells and the marketing of natural gas under the provisions of this act.

55-711. Assessment of costs. The state corporation commission is hereby directed to tax and assess against the parties involved in any hearing or application the costs incurred therein, also all costs to the commission incurred in making the necessary investigations and the enforcement of its orders under this act, and divide such costs among the interested parties in such proportion as may be just and equitable.

55-712. Enforcement of act; agents. The commission is hereby authorized to employ or designate such agents as may in its judgment be necessary to enforce and administer the provisions of this act, and the rules and regulations and orders promulgated thereunder; such agents, with the exception of clerical help, to be experienced in and conversant with the business of the production of natural gas.

55-713. Invalidity of part. If any clause, sentence, section, provision, or part of this act shall be adjudged to be unconstitutional or invalid for any reason by any court of competent jurisdiction, such judgment shall not invalidate, impair, or affect the remainder of this act, which shall remain in full force and effect.

APPENDIX "B"

GENERAL STATUTES OF KANSAS, 1949.

55-606. Petition for rehearing; actions against commission; abstract to be filed; transcript; appeals to supreme court. Any action for judicial review of any rule, regulation, order or decision of the commission may be brought against the commission in the district court of any county in the state wherein the property affected thereby is located, or, if the property affected thereby is located in different counties, then the jurisdiction shall lie in either of such counties. Before any such action may be brought by a person who was a party to the proceeding resulting in the making of a rule, regulation, order, or decision of the commission, a petition for rehearing shall first be filed with the commission within ten days from the date of the making of the rule, regulation, order, or decision in question. A rehearing shall be granted or denied by the commission within ten days from the date said petition is filed and if rehearing be not granted within ten days it shall be taken as denied. If rehearing be granted the matter shall be set for hearing as promptly as shall be convenient, and shall be determined by the commission within thirty days after the same shall be submitted. Such action may be brought by any person aggrieved, whether or not such person was the applicant for rehearing, within thirty days after the denial of the petition for rehearing, or, if rehearing is granted, then within thirty days after the final decision by the commission. If no petition for rehearing be filed, then any person aggrieved who shall not have been a party to any such proceeding before the commission may bring an action for the judicial review of any such rule, regulation, order, or decision of the commission at any time after ten days and within thirty days from the date of the making of such rule, regulation, order or decision. Any rule, regulation, order or decision of the commission may be superseded by the district court upon such terms and conditions as it may deem proper. All actions brought under

this section shall have precedence in any court and on motion shall be advanced over any civil cause of different nature pending in such court, and such action shall be tried and determined as other civil actions. In any such action an abstract of the record of all evidence and proceedings before the commission shall be filed by the complaining party and a counter abstract may be filed by the commission or any other interested party. The district court may, when it deems it necessary and in the interest of justice, remand any such action to the commission with directions that the same be further investigated or additional evidence taken by the commissio After making such further investigation or receiving such additional evidence the commission may change, modify or set aside the rule, regulation, order or decision in question, and if the party who instituted the action for review in the district court shall not be satisfied with such decision, then upon written request of any such party, the commission shall make a report of its further investigation and final decision and send a certified transcript of such additional evidence as may have been tendered by any party in interest to the district court and thereupon the district court shall proceed to hear and determine the action upon the complete record. The court shall not be bound by any finding of fact made by the commission. The authority of the court shall be limited to a judgment either affirming or setting aside in whole or in part the rule, regulation, order or decision of the commission. Appeals to the state supreme court may be taken from the judgment of the district court as in other civil actions. Nothing herein shall be construed in any manner to change, restrict, prohibit, or to deny to any person any of the usual equitable remedies.

APPENDIX "C"

BEFORE THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

In the matter of the application of certain royalty owners in the Hugoton Gas Field requesting orders as to a fixed price and measurement regulations in said Hugoton Gas Field.	)	DOCKET NO. 44,079-C (C-3216)
	)	CONSERVATION DIVISION

ORDER

Now on this 2nd day of December, 1953, the above-entitled matter comes before the Commission for further consideration and final disposition. The Commission having examined the petition, files and record, and being fully advised in the premises, finds:

1. That the petition herein was filed by the Southwest Kansas Royalty Owners Association, a non-profit corporation, and certain individuals who are the owners of minerals in place or royalty interests in the Hugoton Gas Field, and that it is a petition for a new minimum wellhead price in said field of 14 cents per M.c.f. on a pressure basis of 16.4 pounds per square inch or in the alternative not less than 12 cents per M.c.f. measured on a pressure basis of 14.65 pounds per square inch.

2. That after due notice a public hearing was scheduled at the Allis Hotel, Wichita, Kansas, on September 26, 1952, at which time on motion of certain intervenors the matter was continued to October 20, 1952, in Topeka, and that hearings were held thereon at Topeka on October 20, 21, 22 and 23, 1952, December 15, 16, 17, 18 and 19, 1952, and January 14, 15 and 16, 1953.

3. That appearances were entered on behalf of the following: Southwest Kansas Royalty Owners Association and certain individual petitioners by Howard T. Fleeson, Dale M. Stucky, both of Wichita, and A. E. Kraemer, Hugoton, their attorneys; Northern Natural Gas Company by its attorneys Lawrence I. Shaw, Omaha, Nebraska, and Mark Adams, Wichita; Panhandle Eastern Pipe Line Company by its attorneys Edward H. Lange, Kansas City, Missouri, Louis R. Gates, Kansas City, Kansas, and Mark Adams, Wichita; Cities Service Gas Company by its attorneys O. R. Stites, Sr., and Joe Rolston, both of Oklahoma City, Oklahoma, Mark Adams, Wichita, and O. R. Stites, Jr., of Topeka; Kansas-Nebraska Natural Gas Company by its attorneys James Conway, Hastings, Nebraska, and M. F. Cosgrove, Topeka; Kansas-Colorado Utilities by its attorney Harold Bolton, Abilene. Other appearances include: Consumers Cooperative Association, *et al.* by their attorney Phillip Dergeance, Lawrence; Lehigh Portland Cement Company by its attorney Frederick G. Apt, of Iola, and R. F. Jones; Coleman Company of Wichita by A. A. Knapp; the Office of Price Stabilization by its attorney Frank Theis of Arkansas City; the Eastern Kansas Gas Company of Iola, by J. H. Page and John McNally, both of Iola; Kansas Association of Municipal Utilities by its attorney Charles W. Lower, Kansas City, Kansas. That the following attorneys appeared on behalf of cities of Kansas as their respective city attorneys: James W. Wallace, Scott City; C. J. Brenneisen, Kansas City, Kansas; O. C. Jordan, Beloit; Casey Jones, Hill City; Corwin Spencer, Oakley; H. D. Oelschaeger, Plainville; Max Jones, Goodland; Sam W. G. Lowe, Colby; F. A. Sloan, Hoxie; Charles Stough, Lawrence and Fred W. Aley, Wichita; that James A. McClure, Robert L. Webb, Ralph W. Oman, all of Topeka, and Jerome M. Joffee of Kansas City, Missouri, [since deceased] appe ed, representing a group of protesting cities. Jay Kyle, General Counsel and R. C. Woodward, Special Coun-

sel, appeared for the Commission and the public generally. That the Commission has jurisdiction of the subject matter and of the parties.

4. That since the public hearings referred to in Finding No. 2, the Commission entered an order on May 20, 1953, in its Docket No. 34,780-C (C-1825) changing the definition of "Gas, Cubic Foot," as defined by Commission Rule 82-2-201 adopted December 24, 1947, and on file with the Revisor of Statutes pursuant to Laws 1947, Chapter 440. That said order made specific findings relating to the obsolescence of its former rule relating to "Gas, Cubic Foot," which was statewide in its application, and as a result thereof adopted a new definition of "Gas, Cubic Foot," pursuant to its statutory authority (G. S. 1949, Chapter 55, Article 7, as amended). That said definition applies to each and every gas field in the State of Kansas except those wells specifically prohibited from regulation by the proviso in G. S. 1949, 55-703, and applies to all withdrawals of gas in the State of Kansas since July 1, 1953, 12:01 a.m.; said rule as amended is currently on file with the Revisor of Statutes in accordance with G. S. 1949, 77-405 *et seq.*

5. That in Docket No. 35,154-C (C-1868) on February 18, 1949, the Commission promulgated an Interim Order, in which findings included *inter alia* that in the interest of conservation the fair and reasonable minimum price of natural gas at the wellhead in the Hugoton Field should be eight cents (8¢) per M.c.f., and that all takers of gas from said field would attribute thereto, for purposes of payments to producers, landowners, lease owners and royalty owners, the fair and reasonable minimum price of eight cents (8¢) per M.c.f. at the wellhead until further order of the Commission in the investigation instituted by it in Docket No. C-164.

6. That subsequent to the Interim Order dated February 18, 1949, Kansas-Nebraska Natural Gas Company and

Northern Natural Gas Company filed applications for judicial reviews thereof in the District Court of Finney County, Kansas, under the provisions of the Laws of 1945, Chapter 233, Section 9; that likewise, under the same authority, Panhandle Eastern Pipe Line Company brought a similar action in the District Court of Seward County, Kansas; and that Cities Service Gas Company filed a complaint against the Commission in the United States District Court for the District of Kansas, which subsequently was dismissed by that company. The three cases in the state courts were consolidated for hearing before the District Court of Finney County sitting both in the capacity of Judge of Finney County District Court and Judge *pro tem* of Seward County District Court. From adverse decisions in the district courts, all three takers of gas (Kansas-Nebraska, Northern and Panhandle) took appeals to the Supreme Court of Kansas, which upheld the district courts and sustained the Commission's authority to establish the minimum wellhead price of eight cents (8¢) per M.c.f., (*Kansas-Nebraska Natural Gas Co. v. State Corporation Commission*, 169 Kan. 722). The three appellants subsequently filed motions for rehearing which were denied by the Supreme Court, (*Kansas-Nebraska Natural Gas Co. v. State Corporation Co.*, 170 Kan. 341). Following the two Supreme Court decisions just referred to, the Commission in the original docket by appropriate order dated February 21, 1951, promulgated an implementing order to its Interim Order and later entered an Order Nunc Pro Tunc on March 8, 1951, in said docket, to correct an error in its order of February 21, 1951. The Commission, at the time it entered its Interim Order of February 19, 1949, wrote a Memorandum Opinion under date of February 23, 1949, which related some of the history of the field, the powers of the Commission and generally the Commission's jurisdiction over the conservation of this irreplaceable natural resource and the production of gas in the Hugoton Field of Kansas.

It would be unnecessarily repetitious to set out here the contents of that Memorandum Opinion.

7. That the proceeding in this docket is not a rate matter.

8. The Commission as of this date has entered in this docket a Memorandum Opinion which should be incorporated herein and made a part of this order by reference.

9. That because of the voluminous record and the widespread interest in the subject matter, not only in the interest of conservation and protection of correlative rights but also because of the possible effect the decision herein may have on certain classes of rates to consumers, we have felt impelled to re-examine the question of a reasonable minimum wellhead price structure in the Kansas Hugoton Gas Field which is now furnishing gas to more than one-fourth of the states of the Union.

10. It is not disclosed by the record before us that the eight-cent (8¢) price adopted by the Commission through its Interim Order of February 18, 1949, and now in effect, has had any adverse effect upon marketing or marketing conditions in the field or that it has adversely affected ultimate domestic consumer rates. Promulgation of a minimum price is a paramount factor in conservation and the protection of correlative rights. Having a low value in the stages of production, gas can be used uneconomically and wastefully because of the low commercial price being paid at the wellhead. That an important source of gas for the economy of not only Kansas but many other states is the Kansas portion of the Hugoton Gas Field; that gas is not now competitive with other fuels, namely, oil and coal; that the cheapness of gas is conducive to waste as prohibited by statute.

11. That conditions exist which, coupled with known differentials in transportation costs, adversely affect correlative rights.

12. Public records of this Commission clearly indicate that since February, 1948, the number of wells in the field has more than tripled, and that ultimate development of the field is rapidly approaching. All of this leads to the inevitable conclusion that withdrawals from the field are nearing their peak, and also carries the warning that practices of conservation must be heightened if the public is to enjoy the fullest recovery of gas from the Hugoton Field.

13. A true stimulant to conservation is price, and a low price is conducive to waste which is specifically prohibited by G. S. 1949, 55-701. Experience in the Hugoton Field since 1949, the year of the first minimum wellhead order, has shown that a floor price in the interest of conservation supports the concept of conservation by economic uses and the avoidance of waste. It is apparent this can be best accomplished through a realistic minimum field price for this precious fuel.

14. Since price is a prime factor in avoiding various types of waste, strengthening that factor strengthens conservation in the Hugoton Field.

15. The minimum price of eight cents (8¢) per M.c.f. at the wellhead adopted by the Interim Order of February 18, 1949, is not now an effective conservation measure for the various reasons amplified in the Memorandum Opinion.

16. That a fair and reasonable minimum wellhead price to be attributed to all gas taken from the field, except gas used for lease operations, is in the public interest and welfare, encourages conservation, furthers the avoidance of discrimination and helps to promote orderly development and exploration.

17. That currently a fair and reasonable minimum price for gas at the wellhead in the Hugoton Field is eleven cents (11¢) per M.c.f. (14.65 pounds p.s.i.a.).

18. That all persons, firms or corporations which take gas or cause gas to be taken from the Kansas Hugoton Gas Field on and after January 1, 1954, 12:01 a.m., should be required, as a condition precedent for withdrawal from the common source of supply, to pay or attribute to all gas taken, except gas for the operations of leases, for all purposes including payments to producers, landowners, lease owners and royalty owners, the fair and reasonable minimum price of not less than eleven cents (11¢) per M.c.f. (14.65 pounds p.s.i.a.) at the wellhead.

19. That the petition herein should not be granted on either basis requested.

IT IS, THEREFORE, BY THE COMMISSION ORDERED: That the Memorandum Opinion entered herein this date be, and the same is, hereby incorporated and made a part of this order by reference.

IT IS FURTHER BY THE COMMISSION ORDERED: That the petition herein be, and the same is, hereby denied.

IT IS FURTHER BY THE COMMISSION ORDERED: That all persons, firms or corporations which take gas or cause gas to be taken from the Hugoton Gas Field in Kansas on and after January 1, 1954, 12:01 a.m., shall, as a condition precedent for withdrawal from the common source of supply, pay or attribute to all gas taken, except gas for the operations of leases, for all purposes including payments to producers, landowners, lease owners and royalty owners, the fair and reasonable minimum price of not less than eleven cents (11¢) per M.c.f. (14.65 pounds p.s.i.a.) at the wellhead until further order, or orders of this Commission.

[APPENDIX]

The Commission retains jurisdiction of the subject matter and the parties for the purpose of entering such further order or orders, and promulgating and implementing such further rules and regulations as from time to time it may deem proper.

BY THE COMMISSION IT IS SO ORDERED.

RAYMOND B. HARVEY

Raymond B. Harvey, Secretary.

(SEAL)

Reply Brief for the Appellant

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 85

CITIES SERVICE GAS COMPANY, a Corporation,
Appellant,
VERSUS
STATE CORPORATION COMMISSION OF KANSAS, MARIAN BEATTY, Chairman, RICHARD C. BYRD and HARRY G. WILES, as Members of Said Commission, and their Respective Successors in Office,
Appellees.

ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS

REPLY BRIEF FOR THE APPELLANT

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December, 1957.

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In the
Supreme Court of the United States
OCTOBER TERM, 1957

No. 85

CITIES SERVICE GAS COMPANY, a Corporation,
Appellant,

VERSUS

STATE CORPORATION COMMISSION OF KANSAS, MARIAN BEATTY, Chairman, RICHARD C. BYRD and HARRY G. WILES, as Members of Said Commission, and their Respective Successors in Office,
Appellees.

ON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF KANSAS

REPLY BRIEF FOR THE APPELLANT

The Appellees Cannot Change the Issue in This Case.

The brief of the Appellees proceeds upon an unsupportable version of the sole question that is before this Court for decision. Appellees admit in their brief (p. 24) that:

> "The states may not regulate wholesales of gas in interstate commerce after production and gathering for any purpose whatsoever."

This clearly constitutes complete recognition of the rule of law laid down by this Court interpreting the Natural

Gas Act in *Phillips Petroleum Company* v. *State of Wisconsin, et al.*, 347 U.S. 672, 98 L. Ed. 1035; *Natural Gas Pipeline Company of America* v. *Corporation Commission of the State of Oklahoma, et al.*, and *Natural Gas Pipeline Company of America* v. *Panoma Corporation, et al.*, 349 U.S. 44, 99 L. Ed. 866. They seek, however, to avoid the consequences of these decisions of the Court by attempting to reframe the question presented on this appeal (R. 1-2) by asserting:

> "* * * the Kansas order under attack does not regulate sales in interstate commerce at all, either before or after gathering. It regulates severance from the soil and operates prior to completion of production and prior to the time there is a commodity susceptible of either gathering, processing or sale" (Appellees' Brief, p. 24).

In short, Appellees contend that the order only applies to production and the producer and not to the sale of natural gas or the purchase thereof, but nowhere in their brief do they tell this Court that under the plain language of the order the purchaser is not required to pay the producer for the gas purchased the minimum price prescribed by the order. Avoidance of the issue is the age-old practice of a party who cannot either squarely meet such issue or answer the authorities of his adversary pertaining thereto.

Appellees completely disregard the fact that Appellant has at every step in the proceedings in this case contended that it was a natural gas company and said Commission had no jurisdiction or authority to issue said minimum gas price-fixing order as applied to the operations of Appellant

in its purchases of gas in said Kansas-Hugoton Field. It was so asserted in Appellant's petition for rehearing before the Corporation Commission (R. 51), in its petition for judicial review in the District Court of Finney County, Kansas (R. 68), in its motion for a new trial before said District Court (R. 77), in its notice of appeal to the Supreme Court of Kansas, in its argument before that Court (R. 28-29) and in its motion for a rehearing before said Supreme Court (R. 103). It is therefore perfectly clear from the record and the decision of the Supreme Court of Kansas (R. 91) that the order does apply to the operations of Appellant in its purchases of gas in the Kansas-Hugoton Field whether the sales of gas to it therein are made either at the wellhead or after production and gathering thereof by the producer have been completed, and that the Supreme Court of Kansas so determined. As a matter of fact the Court pointed up in its opinion the issue by stating that Appellant was a natural gas company and that it:

> "* * * protested the granting of the relief sought by Petitioners (Royalty Owners) on numerous grounds, *the one here involved being that under the facts and circumstances currently existing in the Kansas-Hugoton Field, and operations of the protestant (appellant) therein, the Commission (Kansas Corporation Commission) had no jurisdiction or authority, either on application of petitioners or otherwise, to fix or determine either a minimum or other price for natural gas produced in* and from such field" (R. 93-94) (Italics supplied).

The issue plainly was and now is the jurisdiction of the Kansas Commission to issue the price order here in

question as applied to the operations of Appellant in its purchases of gas in said field.

Appellees attempt to distinguish the order here under review from the Oklahoma order, by this Court found to be invalid,[1] when no difference exists in the effect of such orders. Appellees further exhaustively cite numerous proration and state occupation or license tax cases, wherein state statutes or orders of state regulatory bodies were challenged under the Commerce or other Federal Constitution clauses, none of which cases have any application to the single federal question here presented. Here Appellant is not challenging the Minimum Price Order on constitutional issues but bases its entire case upon the proposition that such Minimum Price Order directly conflicts with the exclusive jurisdiction granted to the Federal Power Commission under the Natural Gas Act to regulate wholesales of natural gas by producers to interstate pipeline companies. Appellant wishes to respond briefly to the above matters.

I.

The Kansas Price Order here under review regulates sales of gas in interstate commerce.

The Minimum Price Order here involved is so clear and unambiguous that it allows of no interpretation other than that it applies to the sale of gas after it has been brought to the surface, whether such sale be made at the wellhead or at a point other than the wellhead. The order provides,

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[1] *Natural Gas Pipeline Company of America* v. *Panoma Corporation*, 349 U.S. 44.

in substance, that as a condition precedent for taking gas, *or causing gas to be taken*, from the Kansas-Hugoton Field, all persons shall pay, *including payments to producers*, a minimum *price* of not less than 11 cents per Mcf (Emphasis supplied). Certainly the producer cannot pay himself and thus attribute a value. It follows that the payment to the producer as required by the order means *payment by the purchaser*, in this case, Appellant. It is apparent, therefore, under the plain language of the order, that it applies to the sale by the producer and, in this case, clearly it applies to a sale in interstate commerce for resale.

In fact, the Kansas Supreme Court in the decision here under review found (*Cities Service Gas Co.* v. *State Corporation Commission*, 180 Kan. 454, 304 P.2d 528) that the order does apply to a sale. At page 461 of its opinion (R. 99) the Court observed that the Appellant contended that the order was a price-fixing order having application to sales and that Appellees contended that the order was merely a conservation measure limited to the production of gas before cessation of production. The Court said.

> "We are not inclined to labor arguments made by the parties respecting the construction to be given the order. It suffices to say that after a careful analysis thereof we have no difficulty in construing its terms to mean that no person, firm or corporation—first of all the producer—can lift or take gas in its natural state from the depths of the Hugoton Field *to a point further than the wellhead** without, as a condition precedent to its withdrawal from the common source of supply, first attributing thereto a minimum *price** of not less than 11¢ per M.c.f. (14.65# p.s.i.a.). So construed, recognizing as we must that under our own

* Emphasis supplied.

decisions (citing same) as well as those of the highest court of the land (citing cases) the Commission has power to regulate the physical production and gathering of natural gas in the interest of conservation, including the protection of correlative rights and the prevention of waste, the involved order falls squarely within the hereinafter emphasized, excluding provisions of the Natural Gas Act [15 U.S.C.A., sec. 717(b), etc.], which reads:

"'The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply* to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution *or to the production or gathering* of natural gas'."

To further demonstrate that the decision and judgment of the state court here on appeal is not based on the non-applicability of the Minimum Price Order to sales of gas to the Appellant from producers in the Kansas-Hugoton Field, reference is made to the state court's opinion. There it was stated that the only question presented to that court was a federal question. It said, at page 459:

"* * * the sole question presented on appellate review is, that in the light of the facts and circumstances of record,[2] the Commission had no jurisdiction to issue

[2] The facts and circumstances can refer only to the sales of gas by producers to appellant for resale in interstate commerce because those were the only operations of appellant in the field (R. 5-8) (Exs. 35, 36, 37, 38, R. 80-83) and the single federal question presented concerned the validity of said price order as applied to those operations and sales (R. 1-2).

the minimum value, attribution and/or price order in question because the sole and exclusive jurisdiction to make such order is vested in the Federal Power Commission under the Natural Gas Act (15 U.S.C.A. 717)" (R. 96).

In *Columbian Fuel Corporation, a corporation* v. *Panhandle Eastern Pipe Line Company,* 176 Kan. 433, 271 P.2d 1091, the Supreme Court of Kansas had before it a previous minimum price order issued by the Kansas Corporation Commission substantially identical to the one here under review except that it fixed a price or attribution value of 8 cents per Mcf as a condition for taking gas from the producing structures of the Kansas-Hugoton Field. The State Supreme Court, recognizing that the order applied to the sale and delivery of gas to Panhandle Eastern Pipe Line Company, affirmed a judgment of the trial court in favor of the seller of natural gas and against Panhandle, not only for the 8 cents per Mcf minimum price but for the seller's costs of gathering and delivering the gas into buyer's pipeline.

The contention here made by Appellees that the price order here under review relates only to the local incident of production and in no way to a sale is quite similar to that made by the proponents of the Oklahoma Minimum Price Order before the Oklahoma Supreme Court; *Natural Gas Pipeline Company of America* v. *Oklahoma Corporation Commission*, 272 P.2d 425. That Court, in its opinion, states (p. 431):

"Appellants concede that under their contracts the residue gas which they purchase is dedicated to the

fulfillment of such contracts even before the production of the natural gas of which such residue gas is a constituent is produced and that such gas can be sold to no one else. This of course amounts to a sale of the residue gas *in place;* the sale is made before any movement of any kind starts and before anything in the nature of interstate commerce occurs, regardless of the acts required to be performed before the residue gas is separated from other constituents of the raw gas and regardless of the point of delivery to the purchaser" (Emphasis supplied).

Compare *Natural Gas Pipeline Company of America* v. *Panoma Corporation*, 271 P.2d 354, 361. On appeal to this Court, this finding by the lower court either was found to be erroneous or was disregarded because it had no application. In fact, this Court followed the rule denoted in *Hooven and Allison Company* v. *William S. Evatt*, 324 U.S. 652, 659, 89 L. Ed. 1252, wherein the Court held:

"In all cases coming to us from a state court, we pay great deference to its determinations of fact. But when the existence of an asserted Federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained. *Kansas City, Southern R. Co.* v. *Albers Commission Co.*, 223 U.S. 573, 591, 56 L. Ed. 556, 565, 32 S. Ct. 316; *Truax* v. *Corrigan*, 257 U.S. 312, 325, 66 L. Ed. 254, 260, 42 S. Ct. 124, 27 ALR 375; *First Nat. Bank* v. *Hartford*, 273 U.S. 548, 552, 71 L. Ed. 767, 770, 47 S. Ct. 462, 59 ALR 1, and cases cited; *Fiske* v. *Kansas*, 274 U.S. 380, 385, 386, 71 L. Ed. 1108, 1110,

1111, 47 S. Ct. 655; *Norris* v. *Alabama*, 294 U.S. 587, 589, 590, 79 L. Ed. 1074, 1077, 55 S. Ct. 579."

In its review of the Oklahoma decisions, *supra*, this Court overruled the findings of the Supreme Court of Oklahoma to the effect that the sale of residue gas was a sale in place, and found that Oklahoma had attempted to fix a minimum price *to be paid for natural gas after its production and gathering had ended by a company which transports gas for resale in interstate commerce,* and "such a sale and transportation cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission" (*Natural Gas Pipeline Co. of America* v. *Panoma Corp.*, 349 U.S. 44).

To Appellant the Price Order here under review so patently applies to the sale of gas by producers to Appellant, an interstate natural gas pipeline company, that Appellees' contention that it applies only to production and to the producer is frivolous. Nonetheless, before the state courts Appellant specifically posed the question as to whether, under the order, Appellant was required to pay the prescribed minimum price for gas it purchased in the Kansas-Hugoton Field. The same question was asked of Appellees' counsel. Appellant got no answer, probably because no answer could be made except that if the producer were required to charge or attribute the minimum price as a condition precedent to production and delivery, the purchaser, likewise, was required to pay such minimum price. The question not being clearly answered in the opinion of the Kansas Supreme Court, here under appeal, Appellant in its Motion for Rehearing specifically asked the

Court to clarify its decision and inform Appellant of its obligations, if any, under the order, and answer the federal question presented. The Motion for Rehearing in part reads:

> "Unless this Court grants to Appellant a rehearing in this case and, upon such rehearing or otherwise, answers the federal questions presented, and clarifies and determines the applicability of said minimum price order as applied to the undisputed operations of Appellant in its purchases of natural gas in said field, then Appellant is forced to and will assume this Court has decided that said minimum price order of Commission does apply to the undisputed operations of Appellant, and Appellant is required to pay to the producer as a condition precedent to its taking and purchasing of the gas, the minimum price fixed by said order, regardless of whether such sales of gas to it in interstate commerce for resale are made at the wellhead, *after production has ceased,* or in the field, *after production and gathering has ended*" (R. 106).

The Motion for Rehearing was promptly denied, without opinion (R. 109). It therefore is established that for the purpose of this appeal the Price Order of the Commission, as interpreted by the Supreme Court of Kansas, applies to all sales of gas in interstate commerce for resale, whether such sales were made at the wellhead or in the field after production and gathering thereof had been completed.

Assuming arguendo that the state court based its decision upon the ground that the Minimum Price Order applied only to the local operation of production and did not apply to a sale of natural gas, such finding is so palpably erroneous and contrary to the plain language of the order and to the facts as disclosed by the record herein that this

Court should re-examine the facts, as well as the law, in order to determine for itself whether the asserted federal right is to be sustained. (*Hooven & Allison Co.* v. *William S. Evatt, supra.*)

II.

Sales of gas in interstate commerce cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission.

Appellees have cited numerous proration and state occupation tax cases wherein the right of the states to regulate the physical production of gas or to impose state taxes upon the production of minerals was upheld. An examination of these cases reveals that they involved a constitutional challenge under the Commerce Clause or other provisions of the Federal Constitution. Here no such constitutional challenge is made. It is admitted in this Court, (Brief of Appellant, p. 9), and was admitted in the Supreme Court of Kansas that, in the absence of the provisions of the Natural Gas Act, a state may regulate sales of gas in interstate commerce for resale as a conservation measure. (*Cities Service Gas Co.* v. *Peerless Oil and Gas Co., et al.*, 340 U.S. 179, 188-189, 95 L. Ed. 190; *Phillips Petroleum Co.* v. *State of Oklahoma,* 340 U.S. 190, 95 L. Ed. 204). In the *Peerless* case, the Oklahoma Minimum Price Order was challenged under the Commerce and other clauses of the Federal Constitution, not upon the ground here advanced, namely, the conflict of the State Order with a Federal Statute. As the Court stated, in its opinion:

"Appellant does not contend that the orders conflict with the Federal authority asserted by the Natural Gas Act, 52 Stat. 821, ch. 556 (June 21, 1938), 15 USCA, secs. 717, *et seq.*, FCA title 15, secs. 717, *et seq.* (1948). The Federal Power Commission had not participated in these proceedings. Whether the Gas Act authorizes the Power Commission to set field prices on sales by independent producers, or leaves that function to the states, is not before this Court" (188-189).

The issue as to the conflict of the order here under review with the Federal authority asserted by the Natural Gas Act was squarely passed upon by this Court in *Natural Gas Pipeline Company of America* v. *Panoma Corporation*, 349 U.S. 44, wherein this Court held that the state order was invalid because it conflicts with the "exclusive" jurisdiction granted to the Federal Power Commission under the Natural Gas Act to regulate wholesales of natural gas in interstate commerce.

III.

The Federal Power Commission has jurisdiction of sales of gas to appellant in the Kansas-Hugoton Field, notwithstanding the Kansas Price Order here under review.

Since Appellant filed its original brief herein and on November 20, 1957, the United States Court of Appeals, Tenth Circuit, handed down a decision, as yet unreported, wherein it directly decided the issue of the jurisdiction of the Federal Power Commission over sales of gas in interstate commerce, for resale, in the Kansas-Hugoton Field (*Saturn Oil and Gas Co.* v. *Federal Power Comm.*, U.S. Court of App., 10th Cir., No. 5582); for the convenience of

the Court this opinion is attached to the "Brief for the Federal Power Commission as *Amicus Curiae*", as Appendix B (p. 47). This case involved the sale of gas at the wellhead by Saturn, a small unintegrated oil company, from 40 gas wells in the Kansas-Hugoton Field to Panhandle Eastern Pipe Line Company and Northern Natural Gas Company, both interstate pipeline companies. The Court found that after delivery of the gas by Saturn at the wellhead it was commingled in the pipelines of the purchasers with other gas which had been obtained from other wells in the Hugoton Field and that "a substantial majority" of this commingled gas was transported in the pipelines of the two purchasers beyond the boundaries of Kansas and into other states for resale. Saturn vigorously asserted that its wellhead sales were within the exemption contained in Section 1(b) of the Natural Gas Act because they were made prior to gathering. The Court considered at some length the *Phillips Petroleum Co.* v. *Wisconsin* and *Natural Gas Pipeline Co.* v. *Panoma Corporation* cases, *supra*. It is sufficient here to state that the Court found that the Federal Power Commission had jurisdiction over the rates of all wholesales of natural gas in interstate commerce whether made at the wellhead or after production and gathering had been concluded. Of particular significance in the opinion is the Court's reference to the Kansas Price Order here under review. The Court observed that Saturn urged that the extension of the jurisdiction of the Commission to wellhead sales destroys the power of the states to exercise their constitutional power over the conservation of natural resources which had been traditionally used to

regulate the production and gathering of natural gas. With reference to this contention, the Court said (pp. 57, 59):

> "Specifically, Saturn points out that Kansas, in the proper exercise of this power, has fixed a minimum wellhead price for natural gas produced from the Hugoton Field, the field involved in the Saturn operations now before the court.
>
> * * * * * * * * *
>
> "The jurisdiction of the Commission is not defeated by state regulatory action."

CONCLUSION

It is respectfully submitted that the judgment below is so palpably erroneous that it should be summarily reversed pursuant to "Appellant's Motion for Judgment of Reversal."

Respectfully submitted,

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